

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 29, 2006 Session

**RACHEL SUMNER, ET AL. v. METROPOLITAN BOARD OF PUBLIC
HEALTH**

**Appeal from the Chancery Court for Davidson County
No. 05-416-II Carol McCoy, Chancellor**

No. M2005-01820-COA-R3-CV - Filed on August 7, 2006

This appeal involves the efforts of three Davidson County residents to stop the spraying of insecticide for mosquitos in the Nashville area because of the alleged toxic effects of the insecticide. After the Metro Public Health Department's Director of Health rejected the petitioners' proposal, they appealed to the Metropolitan Board of Public Health. When the Board denied their request, they filed a petition for writ of certiorari seeking judicial review of the Board's action. The trial court dismissed the case because it determined that the residents lacked standing to seek review. We conclude that because the Board did not question the petitioners' standing when they appeared before it to appeal the Director of Health's decision to resume spraying, the Board could not later avoid judicial review of its decision upon the ground that the petitioners were without standing. Accordingly, we reverse the trial court's dismissal of the petition for writ of certiorari, and remand for review of the petition upon its merits.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Cause
Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Joseph Howell Johnston, Nashville, Tennessee, for the appellants, Rachel Sumner, Eleanor Snyder, and Carol Frazier.

Eric A. Garrison and John L. Kennedy, Nashville, Tennessee, for the appellee, Metropolitan Board of Public Health.

OPINION

I. Background

Davidson County residents, Rachel Sumner, Eleanor Snyder, and Carol Frazier (“the petitioners”), were concerned about the Metropolitan Board of Public Health’s policy of combatting the West Nile virus by non-emergency spraying of insecticide for mosquitos. They met with the Metro Public Health Department’s Director of Health to express their concerns about the toxic effects of spraying insecticides in the community and to request the spraying be stopped. The Director of Health did not agree to their requests. They appealed the Director of Health’s decision to the Metropolitan Board of Public Health (“Board”), an administrative agency of the Metropolitan Government of Nashville and Davidson County, Tennessee. In their letter to the Board requesting the hearing, they urged the Board to discontinue non-emergency spraying and, before any emergency spraying occur, that Health Department officials establish better notification policies; more meaningful monitoring procedures with full disclosure; buffer zones, which take drift into account for those who have opted out; and improved precautions and information regarding adverse effects of spraying.

Ms. Sumner presented the petitioners’ appeal to the Board at its meeting on December 14, 2004. Ms. Sumner was allotted five minutes to argue the petitioners’ case, after which she was questioned by various Board members. The Board then voted unanimously to deny the appeal.

Thereafter, the petitioners filed a petition for common-law writ of certiorari in the Davidson County Chancery Court, seeking judicial review of the Board’s decision. They alleged that the Board’s actions were arbitrary, capricious, and a denial of due process and requested that the case be remanded to the Board for an evidentiary hearing with adequate public notice. Later, the petition was amended to allege that two of the petitioners had a hypersensitivity to insecticide spray based on previous allergic reactions and that future spraying without adequate public notice as to date, times, and locations, could subject the petitioners and others who are similarly affected by such spray, to a risk of severe allergic reactions which is a “clear and palpable injury ...not shared by the public at large.”

The Board filed a motion pursuant to Tenn. R. Civ. P. 12.02(6) to dismiss upon the ground that the petitioners lacked standing to seek judicial review. After a hearing, the trial court granted the motion and dismissed the petition. Citing the Tennessee Supreme Court’s opinion in *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001), the trial court noted that “[t]o establish standing a plaintiff must show: (1) that it has sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is one that can be addressed by a remedy that the court is empowered to give.” The trial court found that the petitioners failed to demonstrate any of these three elements. Thereafter, the petitioners filed a motion to alter or amend the trial court’s order of dismissal upon grounds that the order contained both erroneous findings of fact and conclusions of law. The petitioners also filed a motion to supplement the administrative record. The trial court denied both of these motions, and this appeal followed.

II. Issue for Review

The issue we review is whether the trial court erred in dismissing the petition for writ of certiorari upon grounds that the petitioners failed to establish standing.

III. Standing

As we have noted, the trial court ruled the petitioners did not have standing under the three-prong test set forth in *City of Chattanooga*. This ruling necessarily proceeded from the legal conclusion that the Board had not previously waived its right to challenge the petitioners' standing. Such a legal conclusion is reviewed *de novo* and is accorded no presumption of correctness on appeal. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993). Based upon our decision in *City of Brentwood v. Metropolitan Board of Zoning Appeals, et al.*, 149 S.W.3d 49 (Tenn. Ct. App. 2004), we have determined that the Board's actions at its meeting of December 14, 2004, precluded it from challenging the petitioners' standing and therefore, the trial court erred in granting the Board's motion to dismiss.

In *City of Brentwood*, Nashville's zoning administrator issued a building permit to an advertising company to construct a billboard. Although the site upon which the billboard was to be constructed was in Davidson County, it was near the boundary line between Davidson County and the City of Brentwood in Williamson County. Brentwood argued that the billboard was inconsistent with improvements it had made near the proposed construction site and filed an appeal of the zoning administrator's decision with the Metropolitan Board of Zoning Appeals, arguing that the billboard violated a metro code provision prohibiting billboards along public streets designated as scenic routes. After presentations by Brentwood and the advertising company, the Board determined that the road upon which the billboard was to be located had not been designated a scenic route and affirmed the issuance of the permit to construct the billboard. Thereafter, Brentwood filed a petition for common-law writ of certiorari in chancery court. Both the Board and the advertising company filed motions to dismiss the petition upon grounds that Brentwood lacked standing to seek review of the Board's decision. The trial court granted this motion and dismissed Brentwood's petition. On appeal, we held that the Board had waived its right to contest Brentwood's petition for writ of certiorari upon grounds of standing. We reviewed a narrative of the meeting at which the Board affirmed the zoning administrator's decision, and we noted a statement in this narrative that "the appellants made their arguments with considerable dialogue with the Board" and that there was no discussion of standing. We further stated as follows:

We have determined that the Board is not in a position to question Brentwood's standing to seek judicial review of its decision. The Board, as a governmental entity, has the prerogative to determine whether applicants appearing before it are entitled to invoke its

authority. It may and should decline to consider applications filed by persons or entities who do not meet the applicable legal requirements. By addressing the merits of Brentwood's application, the Board must necessarily have concluded that Brentwood qualified as an "applicant" under Metro Code § 17.40.275(2001). Having made this determination, the Board cannot later insulate its decisions from judicial review by asserting that Brentwood has no standing to seek judicial review of an administrative proceeding in which it actively participated with the Board's permission.

City of Brentwood, 149 S.W.3d at 55.

The record before us includes the minutes of the meeting of December 14, 2004, and also a transcript of that portion of the meeting pertinent to this case. The Board minutes and the transcript of the meeting show that the Board did not question the standing of the petitioners when Ms. Sumner presented their argument on December 14, 2004. On the contrary, the transcript reveals that the Board engaged in dialogue with Ms. Sumner as to the merits of her argument and encouraged her to return in the future. These actions indicate that the Board must necessarily have determined that the petitioners were qualified to appear before it. As we stated in *City of Brentwood*, "having made this determination, the Board cannot later insulate its decisions from judicial review by asserting that [the petitioners have] no standing to seek judicial review of an administrative proceeding in which they actively participated with the Board's permission." Accordingly, we hold that the Board waived its right to seek dismissal of the petition for writ of certiorari upon grounds that the petitioners failed to establish standing. The trial court's dismissal of the petition for writ of certiorari for lack of the petitioners' standing to seek judicial review was in error, and this case is remanded for a hearing on the merits.

Although the petitioners have raised other issues in this appeal, we decline to address these additional issues upon our determination that they are pretermitted by our decision herein.

IV. Conclusion

For the foregoing reasons, the trial court's dismissal of the petition for writ of certiorari is reversed. The case is remanded for a review of the petition on its merits. Costs on appeal are assessed to the Metropolitan Board of Public Health.

SHARON G. LEE, JUDGE

